

E-filed 6/16/2011

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

AGNES BLACKWELL,
Plaintiff,
v.
WELLS FARGO HOME MORTGAGE, INC.,
Defendant.

Case Number CV-10-04917-JF

**ORDER¹ GRANTING MOTION TO
DISMISS; DENYING MOTION FOR
SANCTIONS**

[Re: Docket Nos. 41, 48]

Plaintiff Agnes Blackwell filed this action following the commencement of non-judicial foreclosure proceedings on her home. The Court dismissed her original complaint for failure to state a claim upon which relief may be granted, allowing her twenty days within which to file any amended pleading. Blackwell filed her amended complaint ten days late. Defendants Wells Fargo Bank, N.A. (Wells Fargo) and Mortgage Electronic Registration Systems, Inc. (MERS), joined by Defendant Federal National Mortgage Association (Fannie Mae), move to strike the amended complaint as untimely, or in the alternative, to dismiss for failure to state a claim upon which relief may be granted. The Court is satisfied that Blackwell, who is representing herself in this action, made a good faith error in calculating the time allowed for filing an amended

¹ This disposition is not designated for publication in the official reports.

1 complaint and in its discretion will deny the motion to strike. However, because the amended
 2 complaint fails to remedy the deficiencies identified by the Court in its order granting Wells
 3 Fargo's motion to dismiss the original complaint, Defendants' alternative motion to dismiss will
 4 be granted without further leave to amend.

5 I. BACKGROUND

6 On May 30, 2007, Blackwell obtained a loan from Wachovia Mortgage Corp., now
 7 known as Wells Fargo Home Mortgage, Inc., a division of Wells Fargo, in the amount of
 8 \$416,000. *See* Defendants' Request for Judicial Notice ("RJN") Ex. A (Deed of Trust). As
 9 security for the loan, Blackwell executed a deed of trust that was recorded on June 6, 2007. *Id.*
 10 The deed of trust identifies Wachovia as the lender; TRSTE, Inc., as the trustee; and MERS as
 11 the beneficiary and nominee for the lender. *Id.*

12 Blackwell alleges that she was told by an agent of Wells Fargo that her monthly
 13 payments would not exceed \$2,200 and would be fixed for the life of the loan, but that when she
 14 closed on the loan she learned that her payments actually would be \$2,988 including taxes and
 15 insurance, and that the loan would be interest-only for 180 months and thereafter would become
 16 a fifteen-year loan with monthly payments of \$3,595.38. First Amended Complaint (FAC) ¶ 61.
 17 Blackwell also alleges that she was assured by Wells Fargo that the loan was affordable and that
 18 she would be able to refinance the loan at a lower rate when the housing market improved. FAC
 19 ¶ 62. She alleges that she was forced to close on the loan for fear of losing her deposit in the
 20 sum of \$14,000. Blackwell also alleges that Wachovia, along with her real estate agent and
 21 appraiser, artificially inflated the sale price of the property. FAC ¶ 3.

22 A substitution of trustee dated September 4, 2009, and recorded on February 19, 2010,
 23 named The Wolf Firm as trustee of the deed of trust. RJN Ex. C. On September 4, 2009, The
 24 Wolf Firm filed a notice of default, stating that it was acting as either "the duly appointed
 25 substitute trustee" or as "an agent for the beneficiary."² RJN Ex. D. A trustee's sale occurred
 26

27 ² The Wolf Firm initially filed a notice of default on August 18, 2009, but rescinded that
 28 notice on September 4, 2009. Compl. Ex. 3-5.

1 on March 11, 2010, and the property was purchased by Fannie Mae. RJD Ex. E. Blackwell filed
 2 this action against Wells Fargo on October 29, 2010.

3 II. DISCUSSION

4 A. Motion to Strike

5 Defendants move to strike the amended complaint in its entirety because it was filed ten
 6 days late. Blackwell concedes that her filing was untimely but states that she mistakenly
 7 believed that she had twenty business days rather than twenty calendar days within which to
 8 amend and that this period ran from the date she received the order rather than the date the order
 9 was signed. In fact, the order stated explicitly that Blackwell had twenty days “from the date of
 10 this order” to file any amended pleadings, Order of Jan. 26, 2011, and Rule 6 provides clear
 11 guidance as to how such a time period is to be calculated. *See Fed. R. Civ. P. 6(a)(1)(b)*
 12 (“[C]ount every day, including intermediate Saturdays, Sundays, and legal holidays.”).

13 However, in light of Blackwell’s *pro se* status, the strong policy interest in resolving cases on the
 14 merits, and the disposition of Defendants’ motion to dismiss, the motion to strike will be denied.

15 B. Motion to Dismiss

16 As she did previously, Blackwell asserts that the *Twombly/Iqbal* standard³ is inapplicable
 17 to plaintiffs proceeding *pro se*. However, as the Court noted in its earlier order, controlling
 18 Ninth Circuit authority holds otherwise. *Hebbe v. Pliler*, 627 F.3d 338, 341-342 (9th Cir. 2010).
 19 Dismissal for failure to state a claim under Rule 12(b)(6) thus is appropriate where “the
 20 complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal
 21 theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). That
 22 said, the Court is mindful of its obligation to construe *pro se* filings with heightened liberality.
 23 *Hebbe*, 627 F.3d at 342 (citing *Bretz v. Kelman*, 773 F. 2d 1026, 1027 n. 1 (9th Cir. 1985) (en
 24 banc)).

25 In its order dismissing Blackwell’s original complaint, the Court concluded that

27
 28 ³ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

1 Blackwell's claims for negligence, fraud, and intentional infliction of emotional distress were
 2 time-barred, and that Blackwell had not alleged with particularity facts that if proved would
 3 entitle her to equitable tolling under California law. Order of Jan. 26, 2011 at 4. In her amended
 4 complaint, Blackwell realleges these claims along with new claims for fraudulent concealment,
 5 unjust enrichment and violations of the Fair Credit Reporting Act. All of these claims arise from
 6 events that allegedly occurred at or before the origination of the loan in May 2007 and are thus
 7 time-barred on their face. *See, e.g.*, Cal. Code Civ. Proc. § 338(d) (two year statute of
 8 limitations for claim of fraudulent concealment); Cal. Code Civ. Proc. § 339(1) (two year statute
 9 of limitations unjust enrichment); 15 U.S.C. § 1681 (two year statute of limitations for a
 10 violation of the Fair Credit Reporting Act).

11 Blackwell contends that the statute of limitations for these claims should be tolled
 12 because Defendants fraudulently concealed the nature of the loan. As the Court observed in its
 13 previous order, Blackwell must allege facts to show: (1) that she had no knowledge of her injury;
 14 (2) that she lacked the means for obtaining such knowledge; and (3) how and when she actually
 15 learned of the injury. Order of Jan. 26, 2011 at 2-3 (citing *California Sansome Co. v. U.S.*
 16 *Gypsum*, 55 F.3d 1402, 1407 (9th Cir. 1995)). Blackwell alleges that she was told “*at the time of*
 17 *signing*” that the monthly payment was \$2,988.05 and that those payments would increase after
 18 180 months. FAC ¶ 61 (emphasis added). Because the allegations show on their face that she
 19 became aware of Defendants' misrepresentations at the time she closed on the loan in 2007,
 20 Blackwell cannot contend that the statute of limitations with respect to her claims should be
 21 tolled. Similarly, Blackwell alleges no facts tending to show her delayed discovery of her claim
 22 that the value of the property was inflated artificially by Defendants.

23 Blackwell does claim that in July 2010 she first learned of the provisions of the Truth in
 24 Lending Act (TILA), 15 U.S.C. § 1601 *et seq*, which led her to conclude for the first time that
 25 disclosures required by TILA had not been made. However, the fact that a plaintiff is unaware
 26 of the law is insufficient to toll a statute of limitations. *See Hinton v. Nmi Pac. Enters.*, 5 F.3d
 27 391 (9th Cir. 1993) (“As a general rule, absent some wrongdoing on the part of a defendant, a
 28 plaintiff's ignorance of his cause of action . . . does not prevent the running of the limitations

1 period.”). The amended complaint does not allege any facts tending to show that Defendants
 2 prevented Blackwell from learning that she suffered harm.

3 Blackwell also asserts claims related to the events leading up to the trustee’s sale of the
 4 subject property. In particular, she alleges that because the substitution of trustee was not
 5 acknowledged or recorded until February of 2010, the notice of default was not filed by an
 6 authorized party and thus was invalid. However, these allegations are not supported by
 7 California law.

8 California Civil Code § 2924(a)(1) provides a “trustee, mortgagee, or beneficiary or any
 9 of their authorized agents” may initiate a nonjudicial foreclosure. While Blackwell focuses on
 10 the dates that the substitution of trustee was acknowledged and recorded, the relevant date for
 11 substitution of trustee is the execution date. *Padayachi v. IndyMac Bank*, No. C 09-5545 JF
 12 (PVT), 2010 U.S. 120963, at *4 (N.D. Cal. Oct. 28, 2010); *Wilson v. Pacific Coast Title*
 13 *Insurance Co.*, 106 Cal. App. 2d 599, 602 (1951) (holding a substitution of trustee valid even
 14 though it was not acknowledged until two years after the execution date). Moreover, even
 15 assuming that The Wolf Firm was not a validly appointed trustee, Blackwell does not allege that
 16 the firm was not acting as an agent for MERS, the beneficiary. *See* Cal. Civ. Code § 2924(a)(1)
 17 (providing that a notice of default may be recorded by the trustee, mortgagee, beneficiary, or any
 18 of their authorized agents).

19 At oral argument, Blackwell indicated that she intended to seek legal counsel and
 20 requested that she be granted leave to amend her pleading after she obtains representation.
 21 While the Court recognizes that consultation with an attorney may help Blackwell to understand
 22 her legal situation, neither the original complaint nor the amended complaint allege any facts
 23 suggesting that a viable federal claim could be stated. Accordingly, the motion to dismiss will
 24 be granted without leave to amend. However, if after seeking legal advice, Blackwell is able to
 25 articulate a valid claim for relief, the Court will entertain a motion for relief from judgment
 26 pursuant to Fed. R. Civ. P. 60(b).

27 **C. Motion for Sanctions**

28 In addition to opposing Defendants’ motion, Blackwell moves for sanctions pursuant to

1 Fed. R. Civ. P. 11. She contends that Defendants' motions were "a knee jerk reaction . . . simply
 2 offered to waste time" and that Defendants' counsel "fail[ed] to speak with candor to the court."
 3 Mot. ¶ 2. Plaintiff asks that the Court impose monetary sanctions or strike Defendant's
 4 pleadings pursuant to Rule 11(c).

5 "Rule 11 authorizes a court to impose a sanction on any attorney, law firm, or party that
 6 brings a claim for an improper purpose or without support in law or evidence." *Vann v. Aurora*
 7 *Loan Servs. LLC*, No. 10-cv-04736-LHK, 2011 U.S. Dist. LEXIS 60223, at *22 (N.D. Cal. June
 8 3, 2011) (quoting *Sneller v. City of Bainbridge Island*, 606 F.3d 636, 638-39 (9th Cir. 2010)).
 9 As is apparent from the foregoing discussion, the Court concludes that Defendants' motion to
 10 dismiss is well-taken. In addition, Blackwell has not shown that she complied with the "safe
 11 harbor" provision of Rule 11, which requires that the party against whom sanctions are being
 12 sought have twenty-one days after service of the motion to withdraw or correct its pleadings
 13 before the motion for sanctions is filed with the Court.

14 **II. ORDER**

15 The motion to dismiss is granted, without leave to amend.⁴ Defendants' motion to strike
 16 and Blackwell's motion for sanctions are denied. The Clerk shall enter judgment and close the
 17 file.

18 **IT IS SO ORDERED**

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 20 DATED: June 16, 2011



JEREMY FOGEL
 United States District Judge

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 28 ⁴ The foregoing analysis is equally applicable to all claims against all Defendants named
 in Blackwell's amended complaint.

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Case Number 5:10-cv-04917 JF

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee of the Office of the Clerk, United States District Court, Northern District of California.

On June 16, 2011, I served a true and correct copy of the attached document to each of the persons hereinafter listed by placing said copy in a postage paid envelope and depositing said envelope in the United States mail, or by placing said envelope in the outgoing mail delivery receptacle located in the Clerk's Office:

Agnes Blackwell
P.O. Box 4418
Santa Clara, CA 95056

DATED: June 16, 2011

For the Court
Richard W. Weiking, Clerk

By: Diana Munz /s/
Courtroom Deputy Clerk